(26,302)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 835.

WILLIAM H. SAGE, HENRY M. SAGE, AND JAMES FENIMORE COOPER, EXECUTORS OF THE LAST WILL AND TESTAMENT OF DEAN SAGE, DECEASED, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 7, 1918.

1 Court of Claims.

No. 33703.

WILLIAM H. SAGE, HENRY M. SAGE and JAMES FENIMORE COOPER, as Executors of the Last Will and Testament of Dean Sage, Deceased,

VS.

THE UNITED STATES.

I. Petition and Amended Petition.

On January 23, 1917 the claimants filed their original petition.
On March 16, 1917 the defendants filed a demurrer to said petition.
On May 7, 1917, by leave of court, claimants filed an amended petition which is as follows:

Amended Petition.

Filed May 7, 1917.

To the Honorable the Chief Justice and the Judges of the Court of Claims:

Your petitioners, William H. Sage, Henry M. Sage and James Fenimore Cooper, as executors of the last will and testament of Dean Sage, deceased, late of the County of Albany, and State of New York, respectfully represent:

I.

On June 13, 1898, the President of the United States approved an act entitled "An Act to provide ways and means to meet war expenditures and for other purposes" (30 Stat., 448, 464-5), by section 29 of which legacies and distributive shares arising from personal property became subject to a tax. Portions of said section
2 29 material to this case are as follows:—

"Section 29. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this Act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bar-

person entitled thereto may maintain such an action against him, as the case requires." (Sec. 1,819.)

VI.

The estate of the said decedent was administered by the said executors diligently and in all respects subject to and in accordance with the laws of the said State of New York. On July 1, 1902, the amount of the debts of said decedent due and payable out of his said estate had not been and could not have been ascertained; what, if anything, would remain out of his said estate for the satisfaction of legacies had not and could not have been ascertained; the time for the payment of legacies, if funds should remain for that purpose, had not arrived and the net, actual or clear value of the said estate and of the interests therein, or any of them, had not and could not have been ascertained.

VII.

On or about June 25, 1903, the United States Collector of Internal Revenue for the Fourteenth District of New York, represented and claimed to your petitioners that a tax in the sum of Sixty-three Thousand Nine Hundred and Forty and 88/100 Dollars ($63,940.88), under the provisions of the Act of Congress of June
6 13, 1898, had been assessed and had become lawfully due to the United States and, thereupon said Collector demanded the payment to him of said Sixty-three Thousand, Nine Hundred and Forty and 88/100 Dollars ($63,940.88) and your petitioners, under protest that neither they nor the said estate were lawfully liable therefor, paid the sum of Sixty-three Thousand, Nine Hundred and Forty and 88/100 Dollars ($63,940.88), as aforesaid, to said Collector. The whole of said Sixty-three Thousand, Nine Hundred and Forty and 88/100 Dollars ($63,940.88) was thereafter, in the ordinary course of business of said Collector, by him turned over and paid to the United States and is now held in the Treasury of the United States.

VIII.

On or about August 24, 1903, application was made to the Commissioner of Internal Revenue, in accordance with Section 3,220 of the Revised Statutes of the United States, for the refund of said Sixty-three Thousand, Nine Hundred and Forty and 88/100 Dollars ($63,940.88), the ground stated in said application for refund being that the legacies arising out of the estate of the said decedent were not subject to taxation under section 29 of the Act of June 13, 1898, and amendments. On or about September 24, 1903, the said application was denied. On or about September 19, 1905, your petitioners brought suit in the United States Court for the Northern District of New York, against John G. Ward, as the said Collector, for the recovery of said Sixty-three Thousand, Nine Hundred and Forty and 88/100 Dollars ($63,940.88), and in said suit your peti-

tioners subsequently, on or about May 17, 1912, obtained judgment against said John G. Ward, in the sum of Thirty Thousand, Two Hundred and Seventy-five and 49/100 Dollars ($30,275.49), with interest and costs, which said judgment was satisfied by the United States.

7 IX.

On or about September 7, 1916, your petitioners made application to the Secretary of the Treasury, in accordance with the Act of Congress of June 27, 1902, and the regulations of the Treasury Department thereunder, asking and demanding of said Secretary of the Treasury, as therein provided, the repayment to them of the remaining Thirty-three Thousand, Six Hundred and Sixty-five and 39/100 Dollars ($33,665.39), retained by the United States out of said Sixty-three Thousand, Nine Hundred and Forty and 88/100 Dollars ($63,940.88), which application was, on or about October 30, 1916, disallowed and rejected, on the ground, as stated in a letter, written under authority of the said Secretary of the Treasury, that—

"A claim for the refund of $63,940.88, the entire amount of tax paid, was rejected September 24, 1903. Subsequent to the rejection of this claim suit was brought for the recovery of the amount claimed in the U. S. Circuit Court for the Northern District of New York, and a judgment in amount of $30,275.49, together with interest and costs, was rendered. Since any rights the claimants might have had under recent decisions of the Supreme Court were merged in this judgment, the claim is hereby rejected."

There has been, and now is, retained by the United States the sum of Thirty-three Thousand, Six Hundred and Sixty-five and 39/100 Dollars ($33,665.39) of the said Sixty-three Thousand, Nine Hundred and Forty and 88/100 Dollars ($63,940.88) which Thirty-three Thousand, Six Hundred and Sixty-five and 39/100 — ($33,665.39) is now due and remains unpaid to your petitioners. The Secretary of the Treasury has refused, and continues to refuse, to refund and pay said sum to your petitioners.

8 X.

Your petitioners are advised by Counsel and therefore aver:

First. That on July 1, 1902, and at all times prior thereto, after the death of the said Dean Sage, the interests upon or in respect of which the said Sixty-three Thousand, Nine Hundred and Forty and 88/100 Dollars ($63,940.88) was collected were, within the meaning of the Act of June 27, 1902, contingent beneficial interests which had not become absolutely vested in possession or enjoyment.

Second. That the said suit of your petitioners against the said Ward was not a suit against the United States and was not a suit to enforce a refund authorized and directed by said Acts of June 27, 1902, and July 27, 1912, and, therefore, in no way bars the rights of your petitioners to claim the refund to them which said Acts of June 27, 1902, and July 27, 1912, command.

XI.

Wherefore your petitioners aver that there is justly owing to them, by the defendants, on account of the facts herein set forth, the sum of Thirty-three Thousand, Six Hundred and Sixty-five and 39/100 Dollars ($33,665.39), after deducting all just set-offs and demands on the part of the United States; and they further aver that they are the sole owners of the claim herein sued upon, and that no transfer or assignment of said claim, or any part thereof, or interest therein, has ever been made; that your petitioners are citizens of the United States and of the State of New York and have not in any way voluntarily aided, abetted or given encouragement to rebellion against the United States; and that they believe the averments in this petition to be true.

9 *Prayers.*

The premises considered, your petitioners pray:

1. That this Honorable Court will render judgment against the United States for the the sum of Thirty-three Thousand, Six Hundred and Sixty-five and 39/100 Dollars ($33,665.39) in favor of petitioners.

2. That petitioners may have such other and further relief as the nature of the case may require and to this Honorable Court may seem meet and proper.

H. T. NEWCOMB,
Attorney for Petitioners.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, a Notary Public in and for the said District of Columbia, H. T. Newcomb, who being duly sworn according to law, deposes and says that he is duly authorized, by power of attorney heretofore filed, to verify this petition and prosecute this cause, that he has read and understands the foregoing petition, and that the matters and things therein set forth are true in substance and in fact, as he is informed and believes.

H. T. NEWCOMB.

Subscribed and sworn to before this 7 day of May, 1917.

(Signed) ETHEL D. PITNEY,
Notary Public.

10 EXHIBIT A.

Last Will and Testament of Dean Sage.

Proved and Recorded July 9th, 1902, as a Will of Real and Personal Estate.

I, Dean Sage, of Menands, Albany county in the State of New York hereby make this my last will and testament, revoking all former wills.

First, I direct that my just debts be paid by my executor hereinafter named, as soon after my death as may by them be found convenient.

Second, I direct that the interests I have in the business of the firm of H. W. Sage & Co., be withdrawn and my portion set aside as soon as may be without injury to the interests of the surviving partners. My interest in the Sage Land & Improvement Company being represented by stock may remain as it is, subject to division with the rest of my estate among my heirs, who I desire should hold this stock as I regard it of great prospective value. The interests that I have with any other persons besides the firm of H. W. Sage & Co. I direct shall be closed up as soon as practicable and wise.

Third, I direct that my executors shall purchase and present to my aunt, Miss C. A. Linn, should she survive me, a suitable gift of the value of five hundred dollars as a token of the appreciation I have of her unselfish devotion to me and to my children.

Fourth, I give to my nephew, Henry W. Sage, the vase presented to my father by the trustees of Cornell University to be kept by said Henry W. Sage during his life, and at his death to go to my eldest male descendant by the name of Sage. If there be no such descendant, then to the eldest male descendant of my daughters. And it is my wish that so far as possible said vase shall be retained among my descendants by the name of Sage.

11 Fifth, I have promised David H. Patton of Albany that in case his son Dean Patton is able to get one of the State scholarships by which he is admitted as a free student to Cornell University, I will pay his board at a reasonable price during the time he remains at Cornell University under the terms and conditions of the scholarship. The payment to be only for such time as Dean Patton may be engaged in his studies at the University at Ithaca. Should I die before these conditions may be fulfilled, I would like my executors to carry out this provision in case it becomes operative through young Patton obtaining the State scholarship.

Sixth, I direct that my wife Sarah M. Sage shall have the free use, during her life, of my residence at Menands near Albany, and of the furniture, books and all equipment connected therewith, should she so desire. Should she wish to live elsewhere, I direct that the place at Menands should be sold and the proceeds thereof and enough more from my estate to make $50,000, invested in the purchase of such a residence elsewhere as she may choose to occupy for her life—the property, if any, thus acquired, to revert to my children or their heirs at the death of my wife.

Seventh, One-third of the remainder of my property of every kind, I give to my executors in trust to receive the rents and profits thereof and apply the same to the use of my wife during her life.

Eighth, The residue of my property of every kind I give to my executors in trust to divide the same into as many shares as I shall have children who survive me and children who may die before me leaving descendants. One such share to be paid and delivered by my said trustees to each of my sons who shall be over twenty-five years of age, and one to each of my daughters who shall be over

thirty-five years of age, at the time of my death; my said trustees to collect the rents, profits and income of each remaining share and apply the same to the use of each of my surviving children, in the case of sons until they shall arrive at the age of twenty-five
12 years and of daughters until they shall arrive at the age of thirty-five years, when the principal sum of said trust shall be paid to them, respectively. In case any of my children shall die before me or after me but before they shall arrive at the age at which they are to receive the principal of their shares as above, leaving descendants, then I direct that the share of each such child so dying shall be divided into as many shares as such child shall leave descendants living, and one such share shall be held in trust for each such descendant living at my death until in the case of boys they shall arrive at twenty-five years of age and of girls at thirty years of age; and in the case of such descendants not born until after my death, until they arrive at the age of twenty-one years. The rents and profits of each share to be applied, so far as necessary, for the support and maintenance of such descendants, and the balance thereof to be accumulated until they arrive respectively at the age of twenty-one years, and then paid to them; and thereafter the entire annual income to be applied to their use.

Ninth, I give my said trustees and their successors power to advance to any of my descendants, if to them it should seem best, a sum not exceeding in amount one-third of the share left to such descendant by this will, such advance only to be made after any such descendants shall arrive at the age of twenty-one years.

Tenth, Upon the death of my wife, I direct that that portion of my property hereby left to her for her life, shall be treated in the same manner as the residuum of my estate, except that the shares of the descendants of my children, if any, shall only be held in trust for each such descendant until he or she arrives at the age of twenty-one years.

Eleventh, In the division of the portion of my estate going to my children, I direct that my executors shall first deduct such sums as I have applied and may hereafter apply to the settlement in life of my children—they consist now of the money I paid for my
13 daughter Susan's house, about $22,000, and the money I gave my son Henry at the time of his marriage, about the same sum; on which and on all future expenditures of this character I desire no interest shall be charged. There is also due me now a note of my son Henry for the purchase of stock in the Sage Land & Improvement Co., which, with interest, is to be deducted from his share in my estate.

Twelfth, I direct that so soon as all or any part of my estate shall come into the hands of my executors, it be invested by them in any sound and solid securities—excluding everything of questionable or speculative value, and to accomplish this, I empower my executors and trustees, and their successors, to sell or lease, resell or re-lease any part of my estate, real or personal, they may deem fit, and to invest from time to time the proceeds of such sales as to them may seem

best, not confining them to th investments which trustees are authorized by law to make.

Thirteenth, I appoint as my executors and trustees my brother William H. Sage, my son Henry M. Sage and my son-in-law, James Fenimore Cooper, and the power of appointing successors to this trusteeship and executorship shall accrue to any two of the executors and trustees of this will on the death or disqualification of their associate. I desire, however, that the first vacancy after the majority of my son Dean Sage Jr., shall be filled by him, and vacancies occurring thereafter shall be filled by persons of my own blood if practicable and unobjectionable.

In testimony whereof, I have hereunto set my hand and seal this eighteenth day of February, A. D. 1899.

DEAN SAGE. [L. S.]

In the presence of:
FREDERICK TOWNSEND.
JAMES F. TRACEY.
SARAH E. PORTER.

14 Signed and sealed as, and published and declared to be his last will and testament by the above-named testator, in our presence and in the presence of each and all of us, who have, at his request, in his presence and in the presence of each other, signed our names as attesting witnesses hereto, this attestation clause having first been read aloud to the testator in our hearing.

FREDERICK TOWNSEND,
Albany, N. Y.
JAMES F. TRACEY,
Albany, N. Y.
SARAH E. PORTER,
Albany, N. Y.

I, Dean Sage of Menands, Albany county, make this codicil to my last will and testament, dated February 18, 1899.

Should any of my descendants die without leaving issue, before arriving at the age fixed for the termination of the trust created of his or her share of my estate, at which age the principal of such trust fund is to go absolutely and be paid by my trustees to each such descendant, I give the share of the descendant so dying, if a child of mine, to my other children and to the descendants of any deceased child, per stirpes. If the one so dying is a grandchild, I give its share to its brothers and sisters, or if it have no brothers and sisters, then to my other descendants per stirpes.

The provision made for my wife in my will dated February 18th, 1899, to which this is a codicil, is intended to be in lieu of her dower.

By the provision of the eleventh subdivision of my will directing my executors to charge against the shares of my children sums applied by me to their settlement in life, I only intend to have so charged the sums heretofore given, or which I may hereafter give to

any of them in the nature of wedding presents, such as those
15 already given to my son Henry and my daughters Susan and Elizabeth, and which are intended by me to provide them each with a suitable home, or with the means of procuring one.

In witness whereof, I have hereunto signed my name and affixed my seal this fifth day of February, one thousand nine hundred.

DEAN SAGE. [L. S.]

Witnesses:

SARAH EVANS PORTER.
FREDERICK TOWNSEND.
FOSTER PRUYN.

Signed and sealed as, and published and declared to be a codicil to his last will and testament by the above-named testator in our presence and in the presence of each of us, who have, at his request, in his presence and in the presence of each other hereunto signed our names as attesting witnesses this 5th day of February, 1900, this attestation clause having been first read aloud to us in the presence of said testator.

SARAH EVANS PORTER,
330 *Madison Avenue, Albany, N. Y.*
FREDERICK TOWNSEND,
3 *Elk Street, Albany, N. Y.*
FOSTER PRUYN,
230 *State Street, Albany, N. Y.*

STATE OF NEW YORK,
Albany County, Surrogate's Court, ss:

I, Quentin S. McNeill, Clerk of the Surrogate's Court of the County of Albany, do hereby certify that I have compared the foregoing copy of the last Will and Testament of Dean Sage, of the Town of Colonie, Albany county, deceased, with the original thereof
16 on file and of record in this office, and have found the same to be a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Surrogate's Court of the County of Albany, this 22d day of August, A. D. 1916.

[SEAL.]

QUENTIN S. McNEILL,
Clerk of the Surrogate's Court.

EXHIBIT B.

The People of the State of New York to all to whom these Presents shall Come, or may Concern, send Greeting:

Know ye, that at a Surrogate's Court, held at the City and County of Albany, on the ninth day of July in the year of our Lord one

thousand nine hundred and two Letters Testamentary of the Last Will and Testament of Dean Sage late of the Town of Colonie, Albany county, deceased, were duly granted and issued by the Surrogate of the County of Albany to William H. Sage, Henry M. Sage and James Fenimore Cooper the Executors named in the Last Will and Testament of said deceased, and that the same are still valid and in full force.

In testimony whereof, we have caused the Seal of Office of our said Surrogate to be hereunto affixed. Witness, Newton B. Van Derzee, Surrogate of our said County, at the City of Albany, the 22d day of August in the year of our Lord one thousand nine hundred and sixteen.

[SEAL.] QUENTIN S. McNEILL,
Clerk to the Surrogate's Court.

17 II. *Demurrer to Amended Petition.*

Filed May 11, 1917.

Now come the defendants, by their Attorney General, and demurring to the amended petition filed herein state as ground thereof that the subject matter of the suit has been previously adjudicated, and state as further ground thereof that the claim is barred by the statute of limitations.

HUSTON THOMPSON,
Assistant Attorney General.

CHARLES H. BRADLEY,
Assistant Attorney.

18 III. *Argument and Submission of Demurrer.*

On January 9, 1918, the demurrer in this case was argued by Mr. Charles H. Bradley, for the defendants, and by Mr. Harry T. Newcomb, for the claimants, and the demurrer was submitted.

IV. *Judgment of the Court.*

Entered Jan. 14, 1918.

In this case it is ordered that the defendants' demurrer to the claimants' amended petition be sustained; and that the petition be and it hereby is dismissed.

By THE COURT.

19 V. *Claimants' Application for, and Allowance of, Appeal.*

Come now the claimants by their attorney, and pray an appeal to the Supreme Court of the United States from the judgment entered herein on the fourteenth day of January, nineteen hundred and

eighteen, sustaining the demurrer to claimants' amended petition and dismissing the said petition.

H. T. NEWCOMB,
Attorney for Claimants.

Filed Jan. 23, 1918.

Ordered, That the above appeal be allowed as prayed for.
By THE COURT.

Jan. 23, 1918.

20 Court of Claims.

No. 33703.

WILLIAM H. SAGE, HENRY M. SAGE and JAMES FENIMORE COOPER, as Executors of the Last Will and Testament of Dean Sage, Deceased,

vs.

THE UNITED STATES.

I, Sam'l A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the order of the court sustaining the defendants' demurrer to the amended petition and dismissing the petition; of the application of the claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington City this January 24, 1918.

[Seal Court of Claims.]

SAM'L A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26,302. Court of Claims. Term No. 835. William H. Sage, Henry M. Sage, and James Fenimore Cooper, executors of the last will & testament of Dean Sage, deceased, appellants, vs. The United States. Filed January 28th, 1918. File No. 26,302.

10

Office Supreme Court, U. S.
FILED
MAR 26 1919
JAMES D. MAHER,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1918.

No. 344.

WILLIAM H. SAGE, HENRY M. SAGE AND JAMES FENIMORE COOPER, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF DEAN SAGE, DECEASED,

v.

THE UNITED STATES.

BRIEF FOR APPELLANTS.

H. T. NEWCOMB,
Attorney for Appellants.

The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

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Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 344.

WILLIAM H. SAGE, HENRY M. SAGE, and JAMES FENIMORE COOPER, as Executors of the Last Will and Testament of DEAN SAGE, Deceased,

v.

THE UNITED STATES.

BRIEF FOR APPELLANTS.

This is an appeal from a judgment of the Court of Claims which sustained defendants' special demurrer (*R. 11*) to appellants' amended petition (*R. 1–11*), and, thereupon, dismissed their suit (*R. 11*).

Summary of Facts Admitted by the Demurrer.

The sum sought to be recovered is the unrecovered **balance of a payment illegally exacted** (*McCoach* v. *Pratt*, *236 U. S. 562*), under color of the legacy tax provisions of the Act of Congress of June 13, 1898, and amendments.

Appellants are the duly appointed, qualified and acting executors of the will of Dean Sage, deceased, and sued the United States, in the Court of Claims, under the Act of July 27, 1912 (*37 Stat. 240*) to re-

cover $33,665.39, the unrecovered balance of the sum of $63,940.88 exacted from the estate represented by them, under color of the legacy tax provisions of the Act of June 13, 1898 (*30 Stat. 448, 464–5*) and amendments.

Dean Sage, a citizen of the United States and of the State of New York and a resident of Albany county, New York, died testate on June 23, 1902 (*R. 3*), and his will was duly admitted to probate and letters testamentary duly issued to appellants on July 9, 1902 (*R. 3*).

On July 1, 1902, the amount of the debts of said decedent, due and payable out of his said estate, had not been and could not have been ascertained; what, if anything, would remain out of his said estate for the satisfaction of legacies had not been and could not have been ascertained; the time for the payment of legacies, if funds should remain for that purpose, had not arrived, and the net, actual, clear value of the said estate and of the interests therein, or any of them, had not and could not have been ascertained (*R. 4*).

The sum of $63,940.88 was exacted, and paid to the United States Collector of Internal Revenue for the Fourteenth District of New York, under protest, on June 25, 1903, and in the ordinary course of business of said Collector was turned over to the defendants (*R. 4*).

Claim for refund of the whole of this $63,940.88 was filed with the Commissioner of Internal Revenue on August 24, 1903, and rejected on September 24, 1903, and on September 19, 1905, appellant sued John G. Ward, the Collector of Internal Revenue who had exacted the payment, in the Circuit Court of the United States for the Northern District of New York, for the whole of said $63,940.88 (*R. 4*).

Judgment, was rendered in this proceeding, against said Ward, for $30,275.49, a part of said

$63,940.88, with interest and costs, and this judgment was satisfied by defendants (*R. 4-5*).

On September 7, 1916, application was made to the Secretary of the Treasury for the refund of the balance of $33,665.39, out of said $63,940.88, and this application was rejected on October 30, 1916 (*R. 5*), the ground for such rejection being stated (*R. 5*) as follows:

> "A claim for the refund of $63,940.88, the entire amount of tax paid, was rejected September 24, 1903. Subsequent to the rejection of this claim suit was brought for the recovery of the amount claimed in the U. S. Circuit Court for the Northern District of New York, and a judgment in amount of $30,275.49, together with interest and costs, was rendered. Since any rights the claimants might have had under recent decisions of the Supreme Court were merged in this judgment, the claim is rejected."

The original petition was filed in the Court of Claims on January 23, 1917 (*R. 1*).

Questions of Law.

The special demurrer set up that the suit was barred by a prior adjudication and by either the limitation provided by R. S. 3227 or R. S. 1069. It was sustained, without opinion, by the Court of Claims, and the petition dismissed. Appellants contend that the Court of Claims erred in not overruling the demurrer.

Statutes.

Act of June 27, 1902 (*32 Stat. 406*) is printed in the Record (*p. 2*).

Act of July 27, 1912 (*37 Stat. 240*) is printed in the Record (*p. 3*).

R. S. 989 is printed in this brief at page 10.

R. S. 1069 is as follows:

> "Every claim against the United States, cognizable by the Court of Claims, shall be forever

barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law, within six years after the claim first accrues: *Provided*, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively."

R. S. 3227 is as follows:

"No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued: *Provided*, That actions for such claims which accrued prior to June six, eighteen hundred and seventy-two, may be brought within one year from said date; and that where any such claim was pending before the Commissioner, as provided in the preceding section, an action thereon may be brought within one one year after such decision and not after. But no right of action which was already barred by any statute on the said date shall be revived by this section."

Argument.

Defendant's special demurrer (*R. 11*) in the Court of Claims admitted the substantial allegations of the petition. In other words, it admitted that Dean Sage died, testate, only a week before the repeal of Section 29 of the Act of June 13, 1898 (*R. 3*); that on the date of the repeal letters testamentary had not issued (*R. 3*), the time for payment of legacies had not arrived (*R. 4*), the value of the estate and the amount of the debts and expenses of administration had not been ascertained (*R. 4*), what if anything would remain for the satisfaction of legacies had not been determined (*R. 4*).

Hence, at the outset, it must be noted that THIS SUIT RESTS UPON THE SOLID FOUNDATION OF THE ILLEGALITY OF THE EXACTION (*United States* v. *Jones, 236 U. S. 106; McCoach* v. *Pratt, 236 U. S. 562*) against which relief is sought. *The demurrer admits, in effect, that the amount sued for was illegally taken from appellants, that it is in the Treasury of the United States without warrant of right and to the injury of appellants and the estate they represent.*

But, these admissions notwithstanding, *appellees contend that the technical situation in which appellants now find themselves is such that the wrong to which they were subjected must remain unredressed.* They argue that the sum which they unlawfully took must be forever withheld from those to whom Congress voted that it should be repaid (*Acts of June 22, 1902, and of July 27, 1918*) because, as they assert, there is no power to order otherwise. The technical objections they assign (*R. 11*) are:

1. That there is a *prior adjudication* which constitutes an estoppel, and

2. That this suit was not brought within the time prescribed by R. S. 3227 or at least R. S. 1069.

While technical defences can be no stronger than the technical situations on which they rest, it will be necessary to consider whether these objections can be sustained upon the facts of the instant proceeding. They will be considered separately.

Merits of Appellants' Claim.

First, however, it will be well to outline the position of appellants as to the merits of this claim. It runs like this:

1. The Act of June 27, 1902, by the last sentence of Section 3 (*R. 2*), prohibited the collection of any tax in respect of any contingent beneficial interest not vested in possession or enjoyment prior to July 1, 1902.

2. The sum now sued for was collected, after June 27, 1902 (*R. 4*), in respect of such unvested contingent interests (*R. 4; United States* v. *Jones, 236 U. S. 106; McCoach* v. *Pratt, 236 U. S. 562*).

3. Hence the sum sued for herein was illegally collected.

4. The Act of July 27, 1912, by its second section (*R. 3*), directed the Secretary of the Treasury to refund such erroneously collected sums in every case of claim therefor made not later than January 1, 1914, whether such claim were made before or after the enactment of the refunding law.

Alleged Prior Adjudication.

The facts concerning the former suit, as alleged in the petition and admitted by the demurrer, are:

"On or about September 19, 1905, your petitioners brought suit in the United States Court for the Northern District of New York against

John G. Ward, as the said Collector, for the recovery of said $63,940.88, and in said suit your petitioners subsequently, on or about May 17, 1912, obtained judgment against said John G. Ward in the sum of $30,275.49, with interest and costs, which said judgment was satisfied by the United States." *R. 5-6.*

No judgment in favor of the United States.

Appellants contend that they are entitled to maintain this suit *despite a judgment in favor of one John G. Ward, who was the Collector of Internal Revenue and the defendant* in a former proceeding. That is, the instant suit refers to a part of the sum that was claimed, as against Ward, in the prior suit, but as to which the judgment was in his favor, *upon grounds not disclosed by this record.* Appellees contended, in the lower court, that the judgment referred to

> " was in effect a judgment against the United States." *Defendant's brief in Court of Claims, p. 19.*

The question first presented, therefore, is:

> *Does the judgment in favor of Ward, as to the portion of the original payment now claimed, constitute an estoppel of which the United States may avail themselves in the instant proceeding?*

The proceeding against Ward was a common law action; *the present suit is to enforce a right conferred by the Act of July 27, 1912.*

> " Appropriate remedy to recover back money paid under protest on account of duties or taxes erroneously or illegally assessed is an action of assumpsit for money had and received." *Philadelphia* v. *The Collector, 5 Wall. 720, 731; Cited with approval, Patton* v. *Brady, Executrix, 184 U. S. 608, 614.*
>
> " The right to sue the Collector for an unjustified collection was given by the Common Law.

> "The jurisdiction over suits against the United States under Section 24, Twentieth of the Judicial Code, extends to all 'claims . . . founded upon . . . any law of Congress.'" *United States* v. *Emery Bird, Thayer Realty Company, 237 U. S. 28, 31.*

This distinction has one of its results in the rule that plaintiffs prevailing in such a suit as that brought against Ward may recover interest (*Erskine* v. *Van Arsdale, 15 Wall. 75*), *while in the present suit interest cannot be recovered* (*Tillson* v. *United States, 100 U. S. 43*).

Moreover, it would seem that the *technical defense* of prior adjudication must rest upon the *technical* character of the prior suit. Of course it was not *technically* a suit against the United States. It could be entertained in the Circuit Court only *because it was not against the United States.*

The suit against Ward was a personal action and in case of his death before it was brought the right of action would have survived against his personal representatives. It was so held in a similar case:

> "It matters not whether we consider the common law or the statute law of Virginia as controlling. By either the cause of action stated in the complaint survived the death of defendant." *Patton* v. *Brady, Executrix, 184 U. S. 608, 612.*

Such suits can be maintained only against the individual who, as collector, exacted the tax, and his personal representatives, in case of his decease, not against his successors in office:

> *Philadelphia, Harrisburg and Pittsburgh Railroad* v. *Lederer, Collector, 239 Fed. 184;*
> *Roberts* v. *Lowe, Collector, 236 Fed. 604.*

Ward was entitled to many defenses, including that of voluntary payment (*Chesebrough* v. *United*

States, 192 U. S. 253, 259), not open to the defendants in this proceeding (*United States* v. *Hvoslef, 227 U. S. 1*). This distinction as to defenses is important (*United States* v. *California Bridge Company, 245 U. S. 337, 341*).

Judgments against collectors do not bind United States.

Judgments against collectors of internal revenue are not binding upon the United States; but, before payment out of the Treasury, it is necessary (1) that the trial court award a certificate of probable cause under R. S. 989, and (2) that the Commissioner of Internal Revenue allow a claim under R. S. 3220.

Frerichs v. *United States, 21 Ct. Cl. 16; affirmed, 124 U. S. 315;*
Dunnegan's Case, 17 Ct. Cl. 247.

Appropriation necessary.

Even after these requirements have been fully met, the judgment cannot be paid until Congress, in its discretion, has made an appropriation for that purpose. The Secretary of the Treasury may be compelled to certify the allowance to the Speaker of the House of Representatives but the legislative discretion is, of course, beyond control.

Whether a claim for such a judgment shall be allowed may be discretionary with the Commissioner of Internal Revenue:

> "This was a matter wholly for the consideration of that officer. He would not have been bound to make the allowance, if all the public officers mentioned had been notified, and had appeared and defended the suit; and, on the other hand, if he saw fit in the exercise of that sound discretion to which Congress has entrusted the power, he might allow the repayment of the amount of the judgment, without previous notice of the pendence of the suit to himself or to any other officer of the Government." *Nixon* v. *United States, 18 Ct. Cl. 448, 456.*

Certificate of probable cause required.

Section 989, of the Revised Statutes, the only statute purporting to make such a judgment in any way a charge upon the Treasury of the United States, is as follows:

> "Sec. 989. When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, *and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government*, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury."

Granting certificate discretionary.

Attention is especially requested to the clause which has been set out in italics. *The defendants evidently assume that if the judgment in the prior suit had been against Ward, as to the amount sued for in the case at bar, a certificate of probable cause would have been accorded. There is no foundation for such an assumption.* The judgment was in favor of Ward and the question did not arise but, whenever it does arise, it is left to the discretion, *the unreviewable discretion*, of the trial judge.

> "We are of the opinion that the refusal of the District Court to grant a certificate of reasonable cause is not a matter which can be reviewed in the Circuit Court or in this Court." *United States* v. *Abattoir Place, 106 U. S. 160.*

The terms "reasonable cause" and "probable cause" have identical meaning.

> "The authorities we have cited speak of 'probable' cause. The statute of 1799, how-

ever, uses the words 'reasonable cause of seizure.' No argument is made that there is a substantial difference in the meaning of these expressions, and we think there is none. If there was a probable cause of seizure, there was a reasonable cause. If there was a reasonable cause of seizure, there was a probable cause." *Stacey* v. *Emery*, *97 U. S.*, *642*.

Estoppels must be mutual.

The foregoing would apparently suffice but *there is another serious obstacle* to considering that a judgment against Ward for the amount claimed in this suit would have bound the present defendants. ESTOPPELS MUST BE MUTUAL (*Reed* v. *Proprietors of Locks and Canals*, *infra*, *14*). *The sovereign character of the United States renders them exempt from suits save by their consent and to the extent and in the manner prescribed by their statutes.* Such exemption would be worthless and the sovereignty merely nominal if an action against an officer could bind the Government. Judgment against Ward in the prior suit, as to the amount involved in the present case, would not have bound the United States. They were not bound by the judgment that was rendered and the officers of the Treasury Department were not *at liberty* to pay it, as already shown (*supra*, *9–11*), unless certificate of probable cause issued and even with such certificate were not *bound* to pay (*supra*, *9*).

Sovereign not bound by judgments against agents.

In *Carr* v. *United States*, *98 U. S. 433*, this Court held that the United States were not bound by judgments in ejectment against their agents, claiming to hold under them, even in a case in which the possession of the agents had been defended by coun-

sel chosen and paid by the United States. The Court said, in part:

> "The appellant contends that this was sufficient to make the United States a virtual party to said actions, and to conclude them by the judgment therein; that by the law of California a judgment in ejectment is an estoppel; and that where a tenant, or other person in privity, with the landlord, is sued, and notifies the landlord to defend, the landlord is bound by the judgment pronounced in the action; . . .
>
> "Whilst we concede that this may be the law of California as it regards private citizens who are landlords, we are not satisfied that the same law can be applied to the government of the United States. We consider it to be a fundamental principle that the Government cannot be sued except by its own consent; and certainly no State can pass a law which would have any validity, for making the Government suable in its courts. It is conceded in the case of *The Siren* (*7 Wall. 152*) and in that of *The Davis* (*10 Wall. 15*), that without an act of Congress no direct proceeding can be instituted against the Government or its property.
>
> . . . . . .
>
> "Without discussing the matter further, we are clearly of opinion that the judgments in the cases relied on by the appellant constitute no estoppel against the United States." *98 U. S. 433, 437-9.*

In *United States* v. *Lee*, *106 U. S. 196*, Mr. Justice Miller, speaking for the majority of the Supreme Court said:—

> ". . . since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the Government, as is decided by this Court in the case of *Carr* v. *United States*, already referred to, the Government is always at liberty, notwithstanding any such judgment, to avail itself of all the

remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights." *United States* v. *Lee*, *106 U. S. 196.*

and the opinion continues:—

"Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery, to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff and the present plaintiff as defendant, the title of the United States could be judically determined." *106 U. S. 196.*

To realize the full import of the foregoing it is necessary to bear in mind that it was said in affirming a judgment in ejectment against officers of the United States and in a proceeding in which the plaintiffs in error were represented by the Solicitor General of the United States.

In *Tindall* v. *Wesley*, *167 U. S. 204*, the following was said:

"It is said that the judgment in this case may conclude the State. Not so. . . . The State not being a party to the suit, the judgment will not conclude it. Not having submitted its rights to the determination of the court in this case, it will be open to the State to bring any action that may be approriate to establish and protect whatever claim it has to the premises in dispute. Its claim, if it means to assert one, will thus be brought to the test of the law as administered by tribunals ordained to determine controverted rights of property; and the record in this case will not be evidence against it for any purpose touching the merits of its claim." *167 U. S. 204, 223.*

To the same effect see:

Stanley v. *Schwalby*, *162 U. S. 255, 271.*

Mutuality Defined.

The defense of prior adjudication protects no one unless it would have protected the opposed party had the result of the prior suit been different.

> "All estoppels are mutual; . . ." *Reed* v. *Proprietors of Locks and Canals, 8 How. 274, 290.*
>
> "Had the judgment been, that no patent issue to George Rogers Clarke, then he would have been estopped to controvert the superior right of the superintendents. If he would have been estopped, so were the superintendents, on the judgment being the other way. *4 Yerg. 333.* Estoppels are mutual." *Porterfield* v. *Clarke, 2 How. 76, 109.*
>
> "It would not even bind complainants *because there would be no mutuality* in the estoppel. It is an impeachment of the legal attainments of the court and of the counsel to suppose that they would make a reference to a master to ascertain a fact which could have no influence on the suit, and if passed upon by the court, could affect nobody's interests in the slightest degree." *Minnesota Co.* v. *St. Paul Co., 2 Wall. 609, 637.*

In *Litchfield* v. *Goodnow's Administrator, 123 U. S. 549*, the plaintiff-in-error had sought the protection of a plea of prior adjudication against a suit brought by the assignee of the Homestead Company. Mr. Chief Justice Waite, for the Court, said:

> "As she was not bound, the Homestead Campany was not bound and its assigns were not. *Estoppels to be good must be mutual.* This was in effect the decision of the Court below, and it was right." *123 U. S. 549, 552.*

See also:

Railroad Company v. *National Bank, 102 U. S. 14, 21-2.*

Tregea v. *Modesto Irrigation District, 164 U. S. 179, 188.*

The plea of prior adjudication, in the instant case, should not be sustained because (1) appellants are entitled to the benefits of the Act of Congress of July 27, 1912, adopted over two months after May 17, 1912, the date on which the judgment in the former suit was rendered (*R.*, *5*); (2) the appellees were not defendants in the former suit; (3) the appellees would not have been bound had the judgment in the former suit been against Ward as to the portion of the tax now sued for, and (4) there could not be that mutuality of relationship necessary to support the plea.

Alleged Bar of the Statutes of Limitations.

This suit is to enforce a right conferred upon appellants by the Act of Congress of July 27, 1912. That Act provided an extension of the period during which claims for taxes illegally assessed or collected under the Act of June 13, 1898, and amendments might be presented and that period terminated with January 1, 1914. All this is found in the first section of the Act of July 27, 1912, *and appellees have apparently given their attention to that section to the exclusion of the second section.*

Second section of Act of July 27, 1912, applies.

It is under the second section that the instant suit was brought and this section authorizes and directs the Secretary of the Treasury—

> "to pay . . . to such claimants as HAVE PRESENTED . . . their claims, and shall establish such erroneous or illegal assessment and collection, any sums paid by them or on their account or in their interest to the United States under the provisions of the Act aforesaid." *Section 2, Act of July 27, 1912.*

This mandate created rights very similar to those raised by the Act of June 27, 1902 (*32 Stat. 406*), which has been repeatedly considered by the courts (*United States* v. *Hvoslef*, *237 U. S. 1*). The

sole difference, except as to subject matter, being that while the Act of June 27, 1902, was made to apply to all payments of the class designated irrespective of the time of application therefor (*Fidelity Trust Company* v. *United States, 45 Ct. Cl. 363, 366-7; The Daly Case, 26 Op. Atty-Gen. 194, 197; Thatcher* v. *United States, 149 Fed. 902, 903-4; United States* v. *Hvoslef, 237 U. S. 1, 11*), the Act of July 27, 1912, applies only to payments as to which claims were filed not later than January 1, 1914. By expressly providing for claimants who "*have presented*" all claims filed prior to the enactment were revived for lawful consideration.

But in all cases of—

> "erroneous or illegal assessment and collection"

the Act of July 27, 1912, requires nothing *except that the claim should be made not later than January 1, 1914.* It might be filed after the enactment or, *in cases in which claims had previously been filed, they were revived by the Act and the Secretary of the Treasury was directed to refund* on the establishment of the fact of erroneous or illegal assessment and collection. No discrimination was made among or against claims previously filed. Congress was aware, when the Act of July 27, 1912, was adopted, that there were many claims on file in the Treasury Department and that many of them had been rejected upon grounds which had subsequently been condemned by the Courts. This is shown by the Committee report recommending the enactment. *Report of Committee on Judiciary, of the House of Representatives, House Report No. 848, Sixty-Second Congress, Second Session.*

Such reports are competent evidence of the intention of Congress:

> *Buttfield* v. *Stranahan, 192 U. S. 470.*
> *The Delaware, 161 U. S. 459.*
> *Danciger* v. *Cooley, 248 U. S. 319, 325.*

Hence, the *second section* of the Act of July 27, 1912, was made to run in favor of "such claimants as *have presented*" as well as those who "shall hereafter so present". The broad scope of the Congressional purpose thus expressed must have been overlooked or appellees could not have suggested, to the Court below, their second technical defense, namely, that this suit was barred by the limitation of R. S. 3227 (which provides that all suits for the refund of internal revenue taxes must be brought within two years from the accrual of the right of action) or, if not, by R. S. 1069 (which requires that suits in the Court of Claims must be brought within six years from the accrual of the right).

Requirements of R. S. 3227 met.

The first of the statutes thus referred to is probably not applicable (*United States* v. *Hvoslef, 237 U. S. 1*), but if it is applicable it is believed that the cause of action which it intends did not accrue until October 30, 1916 (*R. 5*). See *James* v. *Hicks, 110 U. S. 272; Wright* v. *Blakeslee, 101 U. S. 174.* Suit was brought within the six years prescribed by R. S. 1069. Claimants filed claim for the refund of the whole $63,940.88, *all of which was illegally collected as is now admitted by appellees*, on September 24, 1903. This claim was rejected (*R. 4*). It was, however, a claim presented prior to the passage of the Act of July 27, 1912, and, therefore, appellants were among those who "have presented" and so within the benefits of that Act. They were of those who "have presented," referred to in the second section. As *they had presented within the time limited*, they were justified in supposing that, in due course, their claim, which had been revived by the statute, would be considered and the proper amount refunded without further action upon their part. Their money having been illegally taken (*McCoach* v. *Pratt, 236 U. S. 562*), they had no reason to anticipate an adverse attitude on the part of the adjudicating officers and were

under no obligation to press for immediate allowance or for earlier consideration than the convenience of the departmental authorities might indicate. However, on September 7, 1916 (*R. 5*), they did appeal for the payment to which they considered themselves entitled, and on October 30, 1916 (*R. 5*), they were advised that *the Treasury Department held that the judgment in the suit against Ward required the United States to retain the moneys illegally taken from them.* Their cause of action accrued on the date of this rejection (*James* v. *Hicks, 110 U. S. 272; Wright* v. *Blakeslee, 101 U. S. 174*). Promptly thereafter, that is to say on January 23, 1917, the original petition in this suit was filed (*R. 1*). *This was within two years from the refusal of the Treasury Department to make the refund and less than six years from the passage of the Act of July 27, 1912*, which granted the right of refunder which they seek, by this proceeding, to enforce. Section 3227, which fixes the two years' limitation upon suits to recover taxes, has been satisfied, although it probably does not apply to a suit to enforce the gift provided for by the second section of the Act of July 27, 1912, and this is such a suit.

United States v. *Hvoslef, 237 U. S. 1, 14;*
Jones v. *United States, 49 Ct. Cls. 408;*
Fidelity Trust Co. v. *United States, 45 Ct. Cls. 363;*
The Daly Case, 26 Op. Atty. Gen. 194;
Thatcher v. *United States, 149 Fed. 902;*
United States v. *Shipley, 197 Fed. 265, 273.*

R. S. 1069.

The six-years period fixed by R. S. 1069 probably commenced to run with the rejection of October 30, 1916. *At the most it could not have begun to run earlier than July 27, 1912*, the date on which the statutory right to refund was created. The better view, however, would seem to be that the benefit could be demanded, by one who had made claim before or after the enactment but not later than Janu-

ary 1, 1914, at any time—*See the Daly Case, 26 Op. Atty. Gen. 194.*

It is concluded that, (1) if the two years' statute of limitations (*R. S. 3227*) applies the cause of action, which sets it in motion, did not accrue until the adverse decision of the Secretary of the Treasury on October 30, 1916 (*R. 5*), less than three months before suit was brought, while (2) if the six years statute (*R. S. 1069*) applies, the claim which would start it in motion did not arise, at the earliest, until Congress directed the refund, that is, on July 27, 1912.

Conclusion.

The foregoing considered, it appears that appellants are under no technical disabilities which need constrain this Court to deny to them the tardy justice, all they can now receive, of a return, without interest, of the balance of the sum illegally exacted from them, substantially sixteen years ago.

The judgment should be reversed.

All of which is respectfully submitted,

H. T. NEWCOMB,
Attorney for Appellants.

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In the Supreme Court of the United States.

OCTOBER TERM, 1918.

WILLIAM H. SAGE, HENRY M. SAGE, AND James Fenimore Cooper, executors of the last will and testament of Dean Sage, deceased, appellants,
v.
THE UNITED STATES.
No. 344.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

On January 23, 1917, appellants, as executors of the last will and testament of Dean Sage, filed in the Court of Claims their original petition, and on May 7, 1917, their amended petition, seeking to recover from the United States the sum of $33,665.39 (being the unrecovered balance of a total sum of $63,940.88), paid on June 25, 1903, as a tax on the interest of the legatees of the deceased in his personal estate (R. 1–11).

The case was heard and decided upon a demurrer to the amended petition, which was sustained.

The amended petition alleged that Dean Sage, a resident of Menands, Albany County, New York, died on June 23, 1902, leaving a valid will and codicil bequeathing his personal estate to his widow and five children; that said will and codicil were duly admitted to probate and record by the Surrogate's Court for said county, and that letters testamentary were issued to appellants who were named as executors therein (R. 3).

On July 1, 1902, the debts of decedent and the expenses of administration were unascertained and unpaid (R. 4).

On June 25, 1903, the United States Internal Revenue Collector for the Fourteenth District of New York collected from appellants as the tax due on the interest of said legatees in said estate the sum of $63,940.88. It was demanded under section 29 of the Act of Congress approved June 13, 1898, ch. 448, 30 Stat., 448, entitled "'An act to provide ways and means to meet war expenditures and for other purposes,'" and amendments. The tax was paid under protest and was by the collector covered into the Treasury of the United States in the ordinary course of business (R. 4).

On August 24, 1903, application was made to the Commissioner of Internal Revenue for a refund of the tax collected from them, which application was denied. On September 19, 1905, appellants brought suit in the United States Circuit Court for the Northern District of New York against John G. Ward, Collector of Internal Revenue, to recover said

$63,940.88. On May 17, 1912, they obtained judgment for $30,275.49, with interest and costs, which was satisfied by the United States (R. 4–5).

Thereafter, on or about September 7, 1916, appellants made application to the Secretary of the Treasury for repayment of the difference between the tax collected and the amount of said judgment, to-wit, $33,665.39. On October 30, 1916, said application was rejected on the ground that, since the whole amount of the tax was involved in the suit against the collector in New York, the claim for the remainder of said tax must be deemed to be merged in the judgment recovered therein (R. 5). Whereupon the present suit was brought.

The amended petition was demurred to on the grounds that it showed (*a*) that the subject matter of the suit has been previously adjudicated, and (*b*) that the claim is barred by the statute of limitations. The demurrer was sustained and the petition dismissed, the judgment not stating the ground of decision (R. 11). From said judgment this appeal is prosecuted.

ARGUMENT.

I.

The appellants' petition shows that recovery in this case is barred by the judgment obtained in the suit against the Collector of Internal Revenue in 1912

The petition in this case recites that in August, 1903, appellants presented their claim to the Commissioner of Internal Revenue for the refund of the full amount of the tax collected from them

($63,490.88); that in September, 1905, they brought suit in the United States Circuit Court against John G. Ward, "as such collector," to recover said amount, and that in May, 1912, they recovered judgment in said suit against Ward for $30,275.49, "which judgment was satisfied by the United States." (R. 4–5.)

These allegations constitute a clear admission that the subject matter of the former suit was identical with the subject matter of the present suit. The ground of the present suit is that the taxes in question were erroneously collected on "contingent beneficial interests" contrary to the Act of June 27, 1902. Since the latter act was in force at the time the former suit was brought it can only be presumed that the suit was based on the same ground. But whether it was or not is immaterial since the subject matter of the suit was the same.

As said by this court in *Northern Pacific Ry. Co.* v. *Slaght*, 205 U. S. 122, 130–131:

> The question as to [a] judgment when pleaded in bar of another action will be necessarily its legal identity with such action. The general rule of the extent of the bar is not only what is pleaded or litigated, but what could have been pleaded or litigated.

And in *The Haytian Republic*, 154 U. S. 118, 125, the court quoted from the opinion in *Stark* v. *Starr*, 94 U. S. 477, 485, as follows:

> It is undoubtedly a settled question that a party seeking to enforce a claim legal or equitable must present to the court, either

by the pleadings or proofs, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail.

II.

The report of said case in the Circuit Court of Appeals shows that the subject matter was identical with the subject matter of the present suit.

From the decision of the Circuit Court of Appeals for the second circuit in the case against the collector of internal revenue (*Ward* v. *Sage*, 185 Fed. 7) it conclusively appears that the subject matter of said suit was identical with the subject matter of the present suit.

The case recites that the tax which is the subject-matter of this suit was paid to the collector. The same recitals as to demand for and refusal of a refund are made. The prayer is for a judgment for the entire amount of the tax.

The decision states the items composing this entire sum of said tax, to wit, $63,940.88. The decision below found in favor of the plaintiffs, Sage *et al.*, for the entire amount of the taxes sued for. The Circuit Court of Appeals reversed this judgment, holding that the plaintiffs were entitled to recover back of said entire sum of $63,940.88 the sum of $30,275.49, and that they were not entitled to recover the sum of

$33,665.39—the portion of said tax which the plaintiffs are again seeking to recover in the present suit.

The decision of the lower court upon the retrial is not reported and the only information in relation thereto is the admitted fact that judgment was entered against the collector for $30,275.49, and paid by the United States.

The lower court, however, entered its judgment in order to take the further proceedings not inconsistent with the opinion of the Circuit Court of Appeals which the mandate directed, and the legal effect of that judgment was to adjudicate two things:

1st. That there was due from the United States to the plaintiffs under section 3 of the Act of 1902 the sum of $30,275.49.

2nd. That plaintiffs were not entitled to recover the further sum of $33,665.39.

III.

The suit against the Collector was in effect a suit against the United States.

It is suggested, however, that although the subject matter of the two suits may be the same, the parties are different, and that the United States can not avail itself of a judgment entered against a collector of internal revenue.

While the United States was not *eo nomine* a party to the record, the former suit obviously was in effect a suit against the United States, under statutes authorizing it to be so brought, and the least that

can possibly be said is that the United States was a privy to the suit. The requirements of the doctrine of *res judicata* therefore are amply met.

While there undoubtedly exists at common law a right of action against a tax collector to recover sums wrongfully collected and paid under protest, such a suit when brought against a collector of internal revenue is in substance a suit against the United States, the Government by the statutes having consented to be sued in the name of the collector. This conclusion follows from a consideration of the provisions of the statutes relating to such suits.

By section 3210 of the Revised Statutes collectors are required to pay all sums collected daily into the Treasury of the United States. By sections 3220 and 3229 the Commissioner of Internal Revenue is authorized to refund upon application any and all sums wrongfully collected, and, with the advice and consent of the Secretary of the Treasury and the Attorney General, to compromise all suits and prosecutions growing out of the revenue laws. By section 3226 it is provided that no suit shall be maintained in any court for the recovery of any internal taxes alleged to have been wrongfully collected until appeal shall have been duly made to the Commissioner of Internal Revenue. And by section 989 it is provided that when a recovery is had against a collector, and the court certifies that there was probable cause for the act done by the collector, the amount so recovered shall be paid by the United States.

The system so provided is thus described in the case of *State Railroad Taxes*, 92 U. S. 575, 613:

> The Government of the United States has provided, both in the customs and in the internal revenue, a complete system of corrective justice in regard to all taxes imposed by the General Government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer.

In the recent case of *Crocker et al.* v. *Malley*, decided March 17, 1919, this court clearly held that a judgment against a collector of internal revenue is in effect a judgment against the United States, and that the United States is estopped thereby. The collector having erroneously assessed the plaintiffs as an *association* under the Income Tax Act of October 3, 1913, the question arose whether he might retain out of the money so collected the lesser sum for which plaintiffs were liable as *trustees*. On this point the court said:

> The recovery therefore will be from the United States. * * * If the United States retains from the amount received by it the amount that it should have received, it can not recover that sum in a subsequent suit.

In *City of Philadelphia* v. *The Collector*, 5 Wall. 720, 733, the court, in referring to the statutes which authorized and directed the repayment to collectors

of sums of money recovered against them in any court for taxes alleged to have been erroneously or illegally collected, said:

> Clear implication of the several provisions is, that a judgment against the collector in such a case is in the nature of a recovery against the United States, and that the amount recovered is regarded as a proper charge against the revenue collected from that source.

And in *Andreae* v. *Redfield*, 98 U. S. 225, 233, the court said:

> Where the collector acts under antecedent directions from the proper source, it is clear that the suit is in the nature of a suit against the United States.

IV.

The claim for $33,665.39 not having been presented to the Commissioner of Internal Revenue prior to January 1, 1914, is barred by the Act of July 27, 1912.

The argument in support of the application of the Act of July 27, 1912, is developed at length in the Government's brief in the *Coleman Case*, No. 343, October Term, 1918, immediately preceding this case. (See Heads I, II, III, IV.) To avoid repetition reference is made thereto with the request that it be taken as a part of the present brief.

V.

The claim filed in August, 1903, can not be the basis of the present suit. That claim was merged into and extinguished by the judgment.

Appellants seek to escape the bar of the Act of July 27, 1912, by contending that, since section 2 of said act refers to claimants who "have presented" as well as to claimants who "shall hereafter" present their claims, the act had the effect to revive the claim filed by them on August 24, 1903, and that, therefore, their claim was filed within the time prescribed by section 1.

The former claim purported to be filed under section 3220 of the Revised Statutes and was for the full amount of the tax collected, $63,940.88. But that claim can not be relied on as the basis of the present suit. The present suit is for the difference between the amount of the judgment recovered on the former claim and the whole amount of the tax, viz, $33,665.39, and no claim for this amount has ever been presented to the Commissioner of Internal Revenue, although application for the payment thereof was made to the Secretary of the Treasury on September 7, 1916.

The obvious answer to the contention is that the former claim was filed simply as an essential prerequisite to the bringing of a suit against the collector of internal revenue (see section 3226, R. S.), and was merged into and extinguished by the judgment recovered in that suit. (*Supra*, pp. 3–9.)

VI.

No claim presented by the appellants, or any of them, was pending on file when the Act of July 27, 1912, was passed. None has been filed since. The claim therefore could not be considered.

The claim for $63,940.88 filed on August 24, 1903, had been rejected by the Commissioner of Internal Revenue. Its office as a claim for allowance had been terminated by the action of the commissioner.

If it be contended that the purpose of the Act of 1912 was to give to holders of claims the right to have those filed or to be filed prior to January 1st, 1914 paid by the Secretary of the Treasury, clearly there was no provision that a claim filed which had been rejected and on which suit had been brought and the judgment rendered thereon satisfied by the United States should be treated as a pending claim.

If the portion rejected as a valid claim in that suit could be again asserted by virtue of the Act of 1912, clearly a claim for that portion must be presented, not only because claimants insist it is different from the claim as an entirety and severable, but because the former claim filed was no longer pending but had been acted on and terminated as a claim.

It would be straining the language of Section 2 of the Act, taken alone, as indicating that it applied to and covered a claim which had been acted on in August, 1903, and rejected as not owed by the United States.

VII.

If the present suit be regarded as based on the claim filed in August, 1903, then the suit is itself barred by the limitation contained in section 1069 of the Revised Statutes.

Section 3 of the Act of June 27, 1902, c. 1160, 32 Stat. 406, under which recovery is sought, provides a standing appropriation for the payment of claims for the refund of taxes collected under section 29 of the War Revenue Act upon "contingent beneficial interests" which did not vest in possession and enjoyment prior to July 1, 1902. The appropriation is in the nature of a trust fund held by the United States for the use and benefit of claimants of the specified class to be paid over upon the presentation of their claims. (See opinion of the Attorney General in *The Daley Case*, 26 Ops. Atty. Gen. 194, 197, quoted in *Fidelity Trust Co.* v. *United States*, 45 Ct. Cls. 362, 367, and cited in *United States* v. *Shipley*, 197 Fed. 265, 273.)

Claims under this provision being payable on presentation, it follows that the "claim [i. e. cause of action] first accrues" when the application for refund is made within the meaning of section 1069 of the Revised Statutes (Judicial Code Sec. 156), which provides that "every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition * * * is filed in this Court * * * within six years after the claim first accrues."

United States v. *Taylor*, 104 U. S. 216, involved an application under the Act of August 5, 1861, c. 45, 12 Stat. 282, for the refund of the surplus proceeds of a sale of land sold for direct taxes due the United States. The act provided that such surplus proceeds should be deposited in the Treasury for the use of the owners of the land, to be paid over to such owners upon presentation of their claims. Claimant presented her claim approximately ten years after the sale of her property, and brought her suit in the Court of Claims within one year after the rejection of her claim. The court held that the limitation of section 1069 of the Revised Statutes did not begin to run until she presented her claim, saying:

> * * * the right of the owner of the land to recover the money which the Government held for him as his trustee did not become a claim on which suit could be brought, and such as was cognizable by the Court of Claims, until demand therefor had been made at the Treasury. Upon such demand the claim first accrued. As the suit was brought within six years from the date of the demand, it falls within the terms of the section * * * and is not cut off by the lapse of time (p. 222).

This decision has been many times cited and followed (*United States* v. *Cooper* 120 U. S. 124, 126; *Rice* v. *United States*, 122 U. S. 611, 620; s. c. 21 Ct. Cls. 413, 423), and the principle has been held to apply to statutes making a standing appropriation for the payment of claims as well as to statutes creating an express trust (*United States* v. *Wardwell*, 172 U. S.

48; *Simons* v. *United States*, 19 Ct. Cls. 601, 609–10; *Harrison* v. *United States*, 20 Ct. Cls. 175, 179–81; *Wayne, Admr.* v. *United States*, 26 Ct. Cls. 274, 288–89).

It can not be assumed that a claim made in time for suit, and acted on by the department in time for suit, and barred by the statute, was intended to be revived by this Act of 1912, even if no suit had been brought on this claim, such as was brought, and the substantial judgment rendered thereon paid by the United States. *United States* v. *Pennington*, 231 U. S. 631.

CONCLUSION.

The judgment of the Court of Claims should be affirmed.

ALEX. C. KING,
Solicitor General.

APRIL, 1919.

○

SAGE ET AL., EXECUTORS OF SAGE, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 344. Argued April 29, 1919.—Decided May 19, 1919.

A suit against a collector of internal revenue to recover money wrongfully collected as taxes is personal, notwithstanding the statutory provisions for preliminary appeal to the Commissioner, appearance by the district attorney, and payment by the United States in certain cases; and, since the United States is not privy to the judgment, a recovery of part in a suit for the whole against the collector, and satisfaction of the judgment by the United States, do not bar a suit against the United States for the remainder in the Court of Claims. P. 36.

Claims already presented to the Commissioner under the Act of June 27, 1902, c. 1160, § 3, 32 Stat. 406, for taxes on contingent legacies erroneously collected under § 29 of the War Revenue Act of June 13, 1898, and satisfied in part only through a suit against the collector, need not be presented anew in order to obtain, as to the residue, the benefit of the Refunding Act of July 27, 1912, c. 256, 37 Stat. 240. P. 38.

The Act of 1912, *supra*, created new rights; its only condition is that the claims shall have been presented not later than January 1, 1914; and the limitation on suit in the Court of Claims (Rev. Stats., § 1069) does not begin before that date. P. 38.

So *held* where the claim had been presented under the Act of 1902, *supra*, rejected, and in part satisfied through suing the collector, and suit for the residue was begun in the Court of Claims January 23, 1917, application for repayment having been made September 7, 1916, and rejected October 30. *Id.*

53 Ct. Clms. 628, reversed.

THE case is stated in the opinion.

Mr. H. T. Newcomb for appellants.

The Solicitor General for the United States:

The ground of the present suit is that the taxes in question were erroneously collected on "contingent beneficial

interests" contrary to the Act of June 27, 1902. Since the latter act was in force at the time the former suit was brought it can only be presumed that the suit was based on the same ground. But whether it was or not is immaterial since the subject-matter of the suit was the same. *Northern Pacific Ry. Co.* v. *Slaght*, 205 U. S. 122, 130, 131; *Stark* v. *Starr*, 94 U. S. 477, 485.

From the decision in *Ward* v. *Sage*, 185 Fed. Rep. 7, it conclusively appears that the subject-matter of that suit was identical with the subject-matter of the present one.

While the United States was not *eo nomine* a party to the record, the former suit obviously was in effect a suit against the United States, under statutes authorizing it to be so brought, and the least that can possibly be said is that the United States was a privy to the suit. The requirements of the doctrine of *res judicata* therefore are amply met.

While there undoubtedly exists at common law a right of action against a tax collector to recover sums wrongfully collected and paid under protest, such a suit when brought against a collector of internal revenue is in substance a suit against the United States, the Government by the statutes having consented to be sued in the name of the collector. This conclusion follows from a consideration of the provisions of the statutes relating to such suits. *State Railroad Taxes*, 92 U. S. 575, 613; *Crocker* v. *Malley*, 249 U. S. 223; *Philadelphia* v. *The Collector*, 5 Wall. 720, 733; *Andreae* v. *Redfield*, 98 U. S. 225, 233.

The claim for $33,665.39, not having been presented to the Commissioner of Internal Revenue prior to January 1, 1914, is barred by the Act of July 27, 1912.

The claim filed in August, 1903, cannot be the basis of the present suit. That claim was merged into and extinguished by the judgment. The present suit is for the difference between the amount of the judgment recovered

on the former claim and the whole amount of the tax, viz., $33,665.39, and no claim for this amount has ever been presented to the Commissioner of Internal Revenue, although application for the payment thereof was made to the Secretary of the Treasury on September 7, 1916. The former claim was filed simply as an essential prerequisite to the bringing of a suit against the collector of internal revenue (see § 3226, Rev. Stats.), and was merged into and extinguished by the judgment recovered in that suit.

No claim presented by the appellants, or any of them, was pending on file when the Act of July 27, 1912, was passed. None has been filed since. The claim therefore could not be considered.

If it be contended that the purpose of the Act of 1912 was to give to holders of claims the right to have those filed or to be filed prior to January 1, 1914, paid by the Secretary of the Treasury, clearly there was no provision that a claim filed which had been rejected and on which suit had been brought and the judgment rendered thereon satisfied by the United States should be treated as a pending claim.

If the portion rejected as a valid claim in that suit could be again asserted by virtue of the Act of 1912, clearly a claim for that portion must be presented, not only because claimants insist it is different from the claim as an entirety and severable, but because the former claim filed was no longer pending but had been acted on and terminated as a claim.

If the present suit be regarded as based on the claim filed in August, 1903, then the suit is itself barred. Claims under § 3 of the Act of June 27, 1902, being payable on presentation, it follows that the claim [*i. e.*, cause of action] "first accrues" when the application for refund is made, within the meaning of § 1069, Rev. Stats., (Jud. Code, § 156). *United States* v. *Taylor*, 104 U. S. 216;

United States v. *Cooper*, 120 U. S. 124, 126; *Rice* v. *United States*, 122 U. S. 611, 620; *United States* v. *Wardwell*, 172 U. S. 48.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a claim under the Acts of June 27, 1902, c. 1160, § 3, 32 Stat. 406, and of July 27, 1912, c. 256, 37 Stat. 240, to have refunded a tax collected under the Act of June 13, 1898, c. 448, § 29, 30 Stat. 448, 464, 465, upon legacies to the wife and children of the testator Dean Sage. The petition was dismissed by the Court of Claims on demurrer. The testator died domiciled in New York on June 23, 1902, so that the debts of the estate were not ascertained and, as decided in *McCoach* v. *Pratt*, 236 U. S. 562, the legacies were not "absolutely vested in possession or enjoyment" before July 1, 1902, and therefore by the terms of the Act of 1902 were not subject to the tax under the above mentioned § 29. A tax of $63,940.88 was collected, however, in June, 1903. On August 24, 1903, an application to have it refunded on the ground that the legacies were not subject to taxation under § 29 was made to the Commissioner of Internal Revenue, but was denied in the following month. Two years later the petitioners sued the Collector and in May, 1912, got judgment for $30,275.49, with interest and costs, which was satisfied by the United States. *McCoach* v. *Pratt*, *supra*, and *United States* v. *Jones*, 236 U. S. 106, had not been decided at that time and it was held that some of the interests were vested in enjoyment. *Ward* v. *Sage*, 185 Fed. Rep. 7. This suit is for the unrepaid residue and was begun on January 23, 1917. The Government contends that the judgment and also the Act of July 27, 1912, c. 256, § 1, 37 Stat. 240, are bars to the present claim.

The former judgment is not a bar. It is true that the

statutes modify the common-law liability for money wrongfully collected by duress so far as to require a preliminary appeal to the Commissioner of Internal Revenue before bringing a suit. Rev. Stats., § 3226. It is true also that it is the duty of the District Attorney to appear for the collector in such suits, Rev. Stats., § 771; that the judgment is to be paid by the United States and the Collector is exempted from execution if a certificate is granted by the Court that there was probable cause for his act, Rev. Stats., § 989; and that there was a permanent appropriation for the refunding of taxes illegally collected. Rev. Stats., § 3689 (17). No doubt too, if it appeared in a suit against a collector who had acted with probable cause and had turned over his money to the United States, that a part of the tax properly was due to the United States, unnecessary formalities might be omitted and the sum properly due might be retained. Of course, the United States in such a case could not require a second payment of that sum. *Crocker* v. *Malley*, 249 U. S. 223. But no one could contend that technically a judgment of a District Court in a suit against a collector was a judgment against or in favor of the United States. It is hard to say that the United States is privy to such a judgment or that it would be bound by it if a suit were brought in the Court of Claims. The suit is personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different. It does not concern property in which the United States asserts an interest on its own behalf or as trustee, as in *Minnesota* v. *Hitchcock*, 185 U. S. 373, 388. At the time the judgment is entered the United States is a stranger. Subsequently the discretionary action of officials may, or it may not, give the United States a practical interest in the amount of the judgment, as determining the amount of a claim against it, but the claim would arise from the subsequent official act, not from the judgment itself. *United States* v.

Frerichs, 124 U. S. 315. But perhaps it would be enough to say that if the judgment otherwise were a bar the bar would be removed by the subsequent enactment of the Act of July 27, 1912, c. 256, 37 Stat. 240, upon which, as well as the Act of 1902, this claim is based.

The Act of July 27, 1912, after providing in § 1 for the presentation of claims for taxes erroneously collected under the above mentioned § 29, as stated in the preceding case of *Coleman* v. *United States*, *ante*, 30, directs repayment in § 2 to "such claimants as have presented or shall hereafter so present their claims," and establish them. The claimants had presented their claim, and so had complied with the letter of the act. But it is said that they filed it simply as a prerequisite to their suit against the Collector and that its effect was extinguished by the judgment in that suit. This argument reads into the words of the statute what is not there and reads what was there out of the claim. The claim was presented to the Commissioner of Internal Revenue to get the money. The suit was only the undesired alternative in case the Commissioner rejected the claim. It plays no part in the question that we now are considering. Suppose that no suit had been brought we can see no ground for denying that the claim would have been presented within the meaning of the act. It did not have to be a claim under the act as the statute in terms contemplated that it might have been presented before the statute was passed. But if the presenting was sufficient before the suit was brought it is sufficient now. The statute of course does not confine its act of justice to unrejected claims.

The Act of 1912 applied in terms to "all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected" under the above mentioned § 29. The only condition was that it should have been presented not later than January 1, 1914. Until that time no statute of limitations could begin to run.

33. Syllabus.

After the act was passed an application was made on September 7, 1916, to the Secretary of the Treasury for repayment of the residue of the erroneously collected tax. It was rejected on October 30, 1916, on the mistaken ground that the judgment against the Collector finished the matter. This suit was brought on January 23, 1917, and so was within the six years allowed by Rev. Stats., § 1069, for suits in the Court of Claims. The Act of 1912, like that of 1902, created rights where they had not existed before, *United States* v. *Hvoslef*, 237 U. S. 1, 12, 13, and the claimant's rights are not barred. See further *James* v. *Hicks*, 110 U. S. 272.

Judgment reversed.